OAH 84-2001-30915

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Minnesota Department of Natural Resources Special Permit No. 16868 (December 12, 2012) Issued to Lynn Rogers	**ORDERS REGARDING DNR's MOTION TO COMPEL DISCOVERY AND DR. LYNN ROGERS' MOTION IN LIMINE**

This matter initially came before Chief Administrative Law Judge Tammy L. Pust on Dr. Lynn Rogers' Notice of Motion and Motion in Limine filed on January 15, 2014. The Minnesota Department of Natural Resources (Department) filed its response on January 22, 2014. Oral argument was heard on January 25, 2014. The hearing record closed on that day.

In addition, this matter came before the undersigned on the Department's Notice of Motion and Motion to Compel Discovery filed on February 6, 2014. Dr. Lynn Rogers filed his Memorandum in Opposition to the DNR's Motion to Compel on February 7, 2014. No hearing being requested on the motion to compel discovery, the record closed with respect to this motion on February 7, 2014.

David R. Marshall and Leah C. Janus, Fredrikson & Byron, P.A., appeared on behalf of Dr. Lynn Rogers (Rogers).

David P. Iverson, Assistant Attorney General, appeared on behalf of the Department.

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDERS

1. Subject to the terms of the attached Protective Order, the Department's Motion to Compel Discovery is **GRANTED**. Dr. Lynn Rogers is ordered to produce for inspection and copying all documents and data as specified herein by either: mailing copies to the Department's counsel; or allowing the Department's representative access to same at the offices of the Wildlife Research Institute or any other location(s) where the documents and data are maintained. Production shall be made so as to allow

complete access to and inspection of the documents as quickly as reasonably possible so as to avoid any need to delay the scheduled hearing in this matter.

2. Dr. Lynn Rogers' Motion in Limine is **GRANTED IN PART AND DENIED IN PART**, as specified below. If the Department chooses to produce for Dr. Rogers' inspection and copying the specified documents as identified below rather than forego introduction of the redacted versions of same at the hearing in this matter, its production is subject to the terms of the Protective Order attached hereto.

Dated: February 12, 2014

s/Tammy L. Pust
TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM

Factual Background

On an annual basis since 1999, Rogers has applied for and received a permit from the Department allowing him to "capture, handle, radio-collar, and monitor a specified number of bears for research and educational purposes."[1] The Department has granted the permits pursuant to the authority of Minn. Stat. § 97A.401, subd. 3.

Rogers operates the Wildlife Research Institute located in Eagles Nest Township, near Ely, Minnesota. His research methods involve "walk[ing] and rest[ing] with the bears, detailing their activities, diet, social organization, and vocalization."[2] He places radio-collars on the bears so that he can "locate and observe the same bears over time, and … collect data and information relating to bear behavior, territory, and movement."[3] Rogers does not use sedatives or restraints to collar the bears. Instead, he feeds them, by hand or by providing food directly on the ground in front of them, and then collars each bear that is receptive to and allows his actions.[4]

Over the years, the Department has received complaints from members of the public regarding the behavior of bears in the Ely area, some of which have been attributed by the complainants to Rogers' activities. The Department has recorded the

[1] January 13, 2014 Affidavit of Jessica L. Edwards (Edwards Aff.), at Exhibit (Ex.) E.
[2] Rogers' Memorandum of Law in Support of Motion for Summary Judgment, p. 2.
[3] January 14, 2014 Affidavit of Dr. Lynn Rogers, at ¶ 4.
[4] *Id.,* at ¶ 7.

complaint data on variously-titled reports related to bear activities"[5] (collectively referred to as "complaint logs").

Rogers' last issued permit expired on July 1, 2013. The Department refused to renew the permit based on the following itemized concerns:

1. You have produced no peer-reviewed literature based on the permitted activities, in spite of our insistence for many years that this is a critical element of legitimate research.

2. Your habituation of bears to humans – including hand feeding and close interactions between bears and people – creates a very real public safety issue. You have stated that there are more than 50 bears in the Ely area that have been subjects of your work; this creates a large and long-term habituation issue.

3. We are aware of incidents that have been documented in various social media of extremely unprofessional behavior with research bears.[6]

The Department's decision not to renew Rogers' permit forms the basis for the present contested case proceeding.

Applicable Legal Standard

Any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed in a contested case hearing.[7] Minnesota Rules part 1400.6700, subpart 3, permits the filing of a Motion to Compel Discovery. The party seeking discovery has the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery.[8] A party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.[9]

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.[10] It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts and thereby avoid surprises at

[5] *See,* 216 pages of documents provided by the Department for *in camera* review by the Administrative Law Judge at the January 25, 2014 hearing.
[6] June 29, 2013 correspondence from DNR Commissioner to Rogers, attached as Ex. A to Edwards Aff.
[7] Minn. R. 1400.6700, subp. 2.
[8] *Id.*
[9] *Id.*
[10] See, e.g., *Boldt v. Sanders*, 261 Minn. 160,111 N.W.2d 225 (1961).

the ultimate hearing.[11] Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."[12]

In administrative proceedings, information sought in discovery typically is considered to be relevant to the proceeding if the information "has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[13] Rule 26.02 makes it clear that "[r]elevant information sought need not be admissible at the [hearing] if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[14] Accordingly, the definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes.[15]

Rule 26.02(b)(3)(iii) of the Minnesota Rules of Civil Procedure authorizes a court to place limitations on the frequency or extent of use of discovery methods if it finds that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[16] Similarly, Minn. R. 1400.6700, subp. 4, provides that an Administrative Law Judge may "issue a protective order as justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense due to a discovery request."[17]

Department's Motion to Compel Discovery

Factual Background

The undersigned Administrative Law Judge issued a First Prehearing Order on October 11, 2013, which included a discovery deadline of December 31, 2013 and a deadline for dispositive and non-dispositive motions of January 10, 2014. At the request of the parties, the motion deadline was subsequently extended to January 14, 2014.

Within the discovery period and pursuant to Rule 34.01(1), Minn. R. Civ. P., the Department served upon Rogers the following request for production:

> Request for Production No. 4: All data, data sheets, notes, summaries, and other documents, including those in electronic format, containing information obtained from the study of black bears as a result of any DNR

[11] See, e.g., *Hickman v. Taylor,* 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson,* 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville,* 75 N.W.2d 762, 769 (1956).
[12] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure,* § 8.5.2 at 135 (1998).
[13] *Id., §* 9.2 at 146.
[14] Minn. R. Civ. P. 26.02(a).
[15] 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), *citing Detweiler Brothers v. John Graham & Co.,* 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.,* 298 N.W.2d 40 (Minn. 1980).
[16] Minn. R. Civ. P. 26.02(b)(3).
[17] Minn. R. 1400.6700, subp. 4.

special permit issued to [Rogers] by DNR since 1999.[18] [Hereinafter, this data is referred to collectively as "the Rogers research data."]

Rogers objected to the request as "overbroad, unduly burdensome, and calling for the production of proprietary information," but indicated his willingness to consider "a more narrowly tailored request" for collected data deemed relevant to the issues addressed in the contested case proceeding.[19]

The Department noticed the depositions of Rogers and his associate, Susan Mansfield (Mansfield), for December 19 and 20, 2013.[20] At Rogers' request, the depositions were rescheduled to January 21 and 23, 2014. Rogers' deposition took place on January 21, 2014. When asked questions relevant to the form and content of the Rogers research data, Rogers stated that Mansfield would be better able to provide the required information.[21]

At the hearing on Rogers' motion for partial summary judgment and motion in limine on January 25, 2014, counsel acknowledged that discovery was continuing notwithstanding the expiration of the discovery period, given Rogers' request to reschedule the depositions and the need to additionally reschedule Mansfield's deposition at her request due to illness. The Administrative Law Judge issued an oral order extending the discovery period until the completion of the again rescheduled deposition, and noted that any necessary motion to compel would not be deemed untimely on that basis.

Mansfield was deposed on January 29, 2014. She stated that the following data was collected and maintained pursuant to Rogers' permit: "weight and identity data, location data, behavioral data, video footage, den watchers' spreadsheets, field status notebooks, Rogers' personal notebook, Mansfield's personal notebook, diaries, and other data on computers and hard drives."[22] When the Department renewed its request for the production of the Rogers research data, Rogers refused to produce or provide access to it, claiming that: (1) the request was untimely made as beyond the discovery period; (2) the data is irrelevant to the issues being adjudicated; and (3) the data is voluminous and proprietary in nature.[23]

Determination

The Department's motion to compel production of the Rogers research data is timely made. The original Request for Production No. 4. was served on or about September 13, 2013, well within the allowed discovery period. The Request drew an objection by Rogers, which the Department was unable to explore further until Rogers' deposition. The deposition was rescheduled – at Rogers' request – to a date after the

[18] February 5, 2014 Affidavit of David P. Iverson (Iverson Aff.), Ex. B at p. 8.
[19] Iverson Aff., Ex. C at pp. 29-30.
[20] Iverson Aff., Exs. D and E.
[21] Rogers Deposition at 48:14-17; 50:1-5; 62:1-8; 79:12-22, attached to Iverson Aff. as Ex. F.
[22] Department's characterization of Mansfield deposition testimony, attached as Ex. I to Iverson Aff.
[23] Dr. Lynn Rogers' Opposition to the DNR's Motion to Compel.

initial discovery period had lapsed. Roger cannot now rely upon his own refusal to provide timely discovery of information as a basis to charge the Department with a failure of timeliness. Neither can Rogers rely upon the passage of the ordered motion deadline to avoid responding to the request for production, as that deadline was specifically held in abeyance as to issues that arose during the deposition of Mansfield, as noted by the Administrative Law Judge on the record at the January 25, 2014 motion hearing.

As the request was not untimely made, neither is the requested information irrelevant to the issues addressed in this matter. As discussed above, "relevancy" for purposes of discovery is broader than relevancy for purposes of admissibility at trial. At the discovery stage, information is considered to be relevant if it "has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[24]

The last Department permit granted to Rogers specifically allowed him "to conduct a pilot research study of black bears and black bear public education" and to monitor the study bears "telemetrically, visually, and by camera as necessary to collect scientific data."[25] Any violation of the conditions of the permit was specified as grounds for its revocation.[26] Clearly, the existence, content and validity of the data collected by Rogers is logically related to a determination of whether Rogers and his associate actually conducted a research study of black bears through the collection of scientific data. Therefore, the requested information is relevant and discoverable.

Though the Rogers research data may be voluminous, that fact is not a reasonable ground upon which to seek to avoid its production. The Department has attempted to ameliorate the burden and expense Rogers may face in producing the information through duplication and delivery by offering to examine the data where it is maintained, at the Wildlife Research Institute. If Rogers prefers not to allow the Department access to the facility for this purpose, he may avoid that result by producing the data to the Department directly. Pursuant to the authority of Minn. R. 1400.6700, subp. 4, the Administrative Law Judge has issued a Protective Order dated February 12, 2014, which is deemed to be reasonable and necessary.

Rogers' Motion in Limine

In its Motion in Limine, Rogers requests that the Department be precluded from offering the complaint logs into evidence at the hearing because the Department failed to comply with the disclosure requirements of the Minnesota Government Data Practices Act (MGDPA) and the documents are irrelevant, unverified and unduly prejudicial. The Department argues that it has fully complied with its obligations under applicable statutes and rules by producing redacted copies of the complaint logs, and asserts that it is precluded by the MGDPA from producing unredacted copies. In the

[24] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).
[25] Edwards Aff., Ex. E.
[26] *Id.,* at p. 3, ¶ 19.

alternative, the Department requests the issuance of a protective order allowing it to produce unredacted copies under the authority of Minn. Stat. § 13.03, subd. 6.

Factual Background

During the course of discovery in this matter, Rogers promulgated an Interrogatory which requested that the Department identify all facts that led the Department to conclude that Rogers' activities have created a public safety issue, one of the grounds identified for the Department's refusal to renew Rogers' permit. In part, the Department provided the following answer:

> In the past several years, an increasing number of members of the public in the Eagles Nest area have reported to DNR feeling threatened by the bears, and some have provided photographic and other evidence of bears (some with radio collars) very close to their homes and/or acting aggressively (in the opinion of the person reporting the incident). Moreover, it is not simply the number of such encounters that is of concern, but the nature of these encounters. Several of the recent encounters that have been reported represent a public safety risk.[27]

Rogers then requested that the Department produce copies of the complaint logs.[28] The Department produced the complaint logs in redacted form, excising all references to the complainants' identities including names, addresses, telephone numbers and township section numbers, claiming that this information was protected pursuant to the MGDPA. The Department did not redact information related to the nature of the complaint, the location of the reported behavior, and whether the complainant observed a radio collar on the subject bear.[29] Rogers demanded production of unredacted copies of the complaint logs and offered to execute a confidentiality stipulation in an effort to protect the information within the context of this litigation.[30] The Department refused.

In his motion in limine, Rogers now argues that he is entitled to an order excluding the redacted complaint logs from the hearing in this matter on the following grounds: (1) the Department has no lawful basis to redact the data; (2) the data is irrelevant to the issue of whether Rogers' activities are related to the reports of nuisance bear behaviors and/or unduly prejudicial and should be excluded under the rules of evidence; (3) the veracity of the data cannot be verified, which is necessary given the Department's past falsification of complaint data.

[27] Edwards Aff., Ex. I, p. 9.
[28] Edwards Aff., Ex. J, p. 1.
[29] Minnesota Department of Natural Resources' Memorandum of Law in Opposition to Dr. Lynn Rogers' Motion in Limine, at p. 2, corroborated by statements of counsel at motion hearing on January 25, 2014.
[30] Edwards Aff., Ex. K.

The Department resists the motion on several grounds, including agreements it made with complainants to protect their identities[31] and concerns expressed by many about their fear of retaliation from Rogers and/or his supporters if the complainants' identities are made known. More primarily, the Department takes the position that the redactions are justified by specified provisions of the MGDPA, Minnesota Statutes Chapter 13.

Determination

1. The MGDPA Does Not Support the Department's Generalized Redactions.

The Minnesota Government Data Practice Act, at Minn. Stat. § 13.03, subd. 1, provides that all government data are public unless otherwise classified. Arguing that the complaint logs constitute protected and non-releasable government data, the Department takes the position that the data deserves MGDPA protection as: (1) property data under Minn. Stat. § 13.44, subd. 1; (2) security information under Minn. Stat. § 13.37, subd. 1; (3) law enforcement data under Minn. Stat. § 13.82, subd. 17; or (4) electronic licensing system data under Minn. Stat. 13.7931.

A. Except in Limited Instances, the Complaint Logs Are Not Protected Property Data.

Minn. Stat. § 13.44, subd. 1, classifies the following as confidential data[32]: "the identities of individuals who register complaints with government entities concerning violations of state laws or local ordinances concerning the use of real property." Confidential data is inaccessible to the public and the subject of the data.[33] Under these statutory provisions, reviewing authorities have protected from disclosure the identities of individuals who complained about the following: excessive noise on the complainant's or other's property; possible environmental or structural issues related to the use of property under development; and odors emanating from property used by a municipality for wastewater treatment.[34] These decisions make clear that any "activity that occurs on real property is a 'use' of the property" for purposes of section 13.44.[35]

Although an activity occurring on real property is required, it is not sufficient to earn protection under the statute. Two additional elements are essential: (1) a complaint to a government entity; (2) "concerning violations of state laws or local ordinances concerning the use of real property." The Department has clearly established the first element; all of the documentation in the complaint logs relates to complaints made to

[31] The Department is cautioned that it has no authority to make agreements with members of the public that contravene its statutory authority in any respect. If its promised protections are not grounded in the MGDPA or other statutory authority, they are unenforceable and provide no legitimate basis upon which to resist the lawful discovery requests made by Rogers in the present matter.

[32] "Confidential data on individuals is " data made not public by statute or federal law applicable to the data and are inaccessible to the individual subject of those data. Minn. Stat. § 13.02, subd. 3.

[33] Minn. Stat. § 13.02, subd. 3.

[34] *See* Minnesota Department of Administration (IPAD) Advisory Opinion Nos. 11-008; 00-036; 08-003.

[35] IPAD Advisory Opinion No. 00-036.

the DNR, a governmental entity. If the second element merely required proof that the complaints related to the "use of real property," that element too may have been established in that the reported bears were clearly "using" real property in ways that the complainants found objectionable. However, the second element of the statutory protection only applies when the registered complaint "concern[s] violations[36] of state laws or local ordinances" related to the use of real property. Clearly, only a human being or entity can violate laws or ordinances. Excessive noises or foul odors do not violate laws; persons or entities responsible for those conditions may. In the same manner, a bear cannot violate the law; a person responsible for the actions of the bear may. Therefore, reports that refer only to the actions of bears, with no reference to the involvement or actions of any person, are not "complaints … concerning violations of state laws or local ordinances concerning the use of real property" and are not protected property data under Minn. Stat. § 13.44, subd. 1.

The vast majority of reports contained in the Department's complaint logs describe circumstances wherein complainants found one or more bears present on their property and exhibiting behaviors that were troublesome (eating out of garbage cans; destroying bird feeders; damaging screens and decks) or dangerous (following children or adults; failing to leave when threatened with noise or movement; charging toward people, etc.). These reports did not reference any person or corporate entity or allege any violation of law related to the use of real property. Therefore, the protection afforded to property data by Minn. Stat. § 13.44 does not apply to the complaint logs in most instances.

In a few limited instances, however, the complaint logs allege, directly or implicitly by reference,[37] that Rogers was responsible for the behavior of the bears because of his actions caused the bears to habituate to human contact. In these instances, the Administrative Law Judge concludes that the complainants "register[ed] complaints" with the Department that Rogers was responsible for their having experienced human endangerment and/or property damage, both of which are prohibited by various state laws and local ordinances.[38] Therefore, these specific reports constitute instances of individuals "register[ing] complaints concerning violations

[36] Minn. Stat. § 13.44 does not specify that the complainant cite a particular violation of law by statutory source or that the alleged violation be sustained in order for the protection to be earned. The statutory language indicates that the protection attaches as soon as the complainant registers the complaint "concerning" a violation of law or ordinance; establishing the violation is not specifically required nor is there any indication that the protection is lost if the violation is not ultimately proven. This makes sense when viewed in light of the statute's purpose and practical application: an individual who reports to a municipal code enforcement officer that a neighbor's grass is too long should be protected under section 13.44 whether or not the grass is found to be a millimeter shorter than the maximum height defined by ordinance, in that the individual registered a complaint "concerning" a property use in violation of a local ordinance.

[37] The implicit references include the use of names given to specific bears by Rogers and/or noting that the bears were collared. The record in this matter includes no evidence that anyone other than Rogers has a permit to, or a practice of, collaring bears in this area of the state of Minnesota.

[38] The allegations could also potentially constitute violations of Rogers' permit and grounds for its cancellation under Minn. R. 6212.1400, subp. 8, upon the Department's determination that such is necessary "for the welfare of particular [wild animals] or is in the public interest."

of state laws or local ordinances concerning the use of real property," and so are protected under the MGDPA. The following numbered[39] complaints constitute protected property data such that their redaction by the Department is consistent with and required by Minn. Stat. § 13.44:[40] complaint log documents numbered 27, 45, 47, 49, 55-57, 59-60,63-65, 69-71, 75-79, 81, 83-84, 89, 95, 105-106, 132-133, 142, 152-153, 164, 186, 189-191, and 194-200.

B. Except in Limited Instances, the Complaint Logs Are Not Protected Security Information.

At section 13.37, subd. 2, the MGDPA provides that "security information" is protected and nonpublic data. "Security information" is defined as follows:

> "Security information" means government data the disclosure of which the responsible authority determines would be likely to substantially jeopardize the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury. "Security information" includes crime prevention block maps and lists of volunteers who participate in community crime prevention programs and their home and mailing addresses, telephone numbers, e-mail or other digital addresses, Internet communication services accounts information or similar accounts information, and global positioning system locations.[41]

As interpreted by the Commissioner of Administration in IPAD Advisory Opinion No. 98-046, data is protected security information only if its release would "substantially jeopardize … individuals or property against … trespass or physical injury." The Department must be able to identify that "specific concerns have been raised about individual safety,"[42] generalized concerns about community discomfort or personal reputational interests are not sufficient. The Department is required to engage in a thorough review of the reports included in the complaint logs to determine whether "under limited circumstances, [it] has specific reason to conclude that dissemination of some of those data would be likely to substantially jeopardize information, possessions, individuals or property [in order to conclude that] those specific data are not public, pursuant to section 13.37."[43]

The record contains no evidence that the Department engaged in this type of analysis in the present case. Instead, the record indicates that the agency merely deemed all 216 pages of the complaint logs to constitute protected security data. This

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[39] Although the complaint logs provided by the Department for *in camera* review were not numbered or batestamped, the Administrative Law Judge has numbered the pages from page 1 to 216. A numbered set has been provided to the Department for ease in complying with this Order.

[40] The data are inaccessible to the individual subject of the data. Minn. Stat. § 13.02, subd. 3..

[41] Minn. Stat. § 13.37, subd. 1.

[42] IPAD Advisory Opinion No. 01-029.

[43] *Id.* (emphasis added).

determination is not supported by the MGDPA, and provides no lawful basis for the Department's redactions.[44]

C. The Complaint Logs Are Not Protected Law Enforcement Data.

The Department carries on law enforcement functions in certain situations and so is covered by the protections provided in section 13.82 of the MGDPA. Relying upon this coverage, the Department seeks to protect the complaint logs from disclosure based on the protections provided to informants and victims of or witnesses to crime.[45]

The Department's position lacks merit. Notwithstanding the references to referrals made by the Department's conservation officer to the St. Louis County Sheriff's Department,[46] the record fails to establish that any specific crime has been committed; therefore the complainants do not constitute crime witnesses or victims. In addition, the Department has not produced sufficient evidence upon which the Administrative Law Judge could determine "that revealing the identity of the [complainants] would threaten the personal safety or property of the individual."[47] The submitted affidavit testimony does reference an incident when Mansfield's car allegedly "swerv[ed] to purposely hit the complainant while he was walking on a public roadway," but the hearsay nature of that testimony weakens its effectiveness as a basis for section 13.82 protection. None of the affidavit testimony characterizing the complainants as confidential informants addresses the complainants' credibility, reliability or basis of knowledge,[48] without which the testimony is less than persuasive as to the requested MGDPA protections. The mere fact that individuals have reported that they fear retaliation from Rogers, without credible evidence that Rogers has ever threatened to or harmed any person or property, is an insufficient basis to seek protection from disclosure under this provision of the MGDPA.

D. The Complaint Logs Are Not Protected Licensing Data.

At Minn. Stat. § 13.7931, the MGDPA provides privacy protections for Department data "created, collected, stored, or maintained by the department for the purposes of obtaining a noncommercial game and fish license . . . ."[49] Rogers' request for production of data did not include identification of licensed hunters in Minnesota.

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[44] In a handful of instances, including those attached as exhibits to the Affidavit of Thomas P. Rusch, the reports do contain specific references to a complainant's fear of retaliation from Rogers if the reporter's identity is revealed. There is nothing specific in the record to support a finding that these fears are justified and that release of the data will "substantially jeopardize" the reporter's safety, and so no basis for the Administrative Law Judge to make a separate determination of section 13.37 applicability as to these reports. The point is moot, however, given that these reports are also included in the group determined to constitute protected property data under Minn. Stat. § 13.44.

[45] *See* Minn. Stat. § 13.82, subd. 17(c) and (d).

[46] Affidavit of Danny J. Starr, ¶ 5.

[47] *Id*.

[48] See *State v. Wiley*, 366 N.W.2d 265, 271 (Minn. 1985) (describing elements of testimony related to informants necessary to establish probable cause in the criminal law context).

[49] *See also* Minn. Stat. § 84.0874.

The fact that some of the complainants whose reports are documented in the complaint logs may be licensed hunters is irrelevant to the legal issues here under consideration.

In conclusion of the MGDPA analysis, the Administrative Law Judge finds that the Department's redactions of the complainants' identifying information in the complaint logs is not allowed by law except as to the documents which constitute property data entitled to the protections of Minn. Stat. § 13.44. Other than with regard to those specified exceptions, the MGDPA does not authorize the Department to redact the complaint logs in this matter.

2. The Complaint Logs are Relevant But Unduly Prejudicial in Redacted Form.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[50] Under Rule 402, Minnesota Rules of Evidence, "all relevant evidence is presumptively admissible unless exclusion is mandated by other controlling law."[51]

One of the facts in issue is whether Rogers' activities have caused increased bear nuisance activity and endangered the safety of the public. The activity of bears in the subject area, if sufficiently related to the actions of Rogers and his associates, would logically tend to prove or disprove the material fact of the permit's effect on public safety. Therefore, the complaint logs are relevant and admissible, unless excluded as unduly prejudicial or on the basis of other controlling law.

Even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [fact finder], or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[52] Rogers' asserts that the complaint logs, if found relevant, should be excluded as unfairly prejudicial.

The Administrative Law Judge finds that admission of the complaint logs in redacted form without a sufficient legal basis therefor would rise to the level of unfair prejudice under Rule 403. "[U]nfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage."[53] Admitting the redacted complaint logs, except to the extent allowed as protected property data as specified above, would give the Department an unfair advantage. The Department should not be able to circumvent its legal authority, even for the laudable purpose of seeking to protect the public, and thereby disadvantage a party that has lawfully challenged the agency's action.

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[50] Rule 401, Minn. R. Evidence; *See also Colby v. Gibbons*, 276 N.W.2d 170, 176 (Minn. 1979) citing *Boland v. Morrill*, 270 Minn. 86, 99, 132 N.W.2d 711, 719 (1965).
[51] *Kalia v. St. Cloud State Univ.*, 539 N.W.2d 828, 833 (Minn. Ct. App. 1995).
[52] Rule 403, Minn. R. Evidence.
[53] *State v. Schulz*, 691 N.W.2d 474, 478-79 (Minn. 2005) citing *State v. Cermak,* 365 N.W.2d 243, 247 n. 2 (Minn.1985) (quoting 22 Charles A. Wright Kenneth W. Graham, *Federal Practice and Procedure-Evidence* § 5215 at 274-75 (1978)); *State v. Axford,* 417 N.W.2d 88, 92 (Minn.1987), *reh'g denied* (Minn. Jan. 15, 1988).

For these reasons, the Administrative Law Judge finds in favor of Rogers on the motion in limine as follows:

- Except as to those documents deemed protected property data under Minn. Stat. § 13.44, the motion in limine is granted with respect to the redacted copies of the complaint logs.

- If the Department chooses[54] to provide unredacted copies of the unprotected complaint logs, the motion in limine is denied as to the admissibility of the unredacted copies.[55]

3. **Justice Requires the Issuance of a Protective Order.**

The MGDPA allows a government agency to seek a protective order with regard to the release of discoverable data. The Department has requested issuance of such an order, and provided the subject documents for *in camera* review pursuant to Minn. Stat. § 13.03, subd. 6.[56]

Having found the complaint logs to be discoverable, in the main in unredacted form and in redacted form with regard to those which constitute protected property data, the Administrative Law Judge now finds that the benefit of the disclosure of the data to Rogers outweighs any identifiable harm to the confidentiality interests of the Department, the complainants or others identified in the data. The Administrative Law Judge further finds that, pursuant to all lawful authority including Minn. R. 1400.6700, subp. 4, justice requires the issuance of a protective order to protect the complainants and other persons identified in the complaint logs from undue annoyance, embarrassment, harassment, approbation, retaliation, ridicule, burden or expense. Accordingly, the Administrative Law Judge issues the Protective Order attached as Exhibit A.

T. L. P.

[54] Rogers did not bring a motion to compel production of the unredacted complaint logs, but instead sought only to exclude the redacted documents from admission into evidence. As such, the Administrative Law Judge has not ordered the production of unredacted complaint logs.

[55] If the Department chooses to avoid the exclusion of the complaint logs in their redacted form by providing unredacted copies, Rogers still has ample time to confirm the veracity of the data, consistent with the terms of the issued Protective Order. If the agency does not provide unredacted copies and the order of exclusion is maintained, Rogers' verification argument, in which he asserts that the documents should be excluded based on his inability to verify their accuracy, is moot, for which reason it is not specifically addressed herein.

[56] *See*, *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990); *State v. Renneke*, 563 N.W.2d 335 (Minn. Ct. App. 1997).